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IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent.

MEMORANDUM IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

CHARLES AVERETTE CARSON, III
419 Title & Trust Building
Phoenix, Arizona,
Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

No. 853

ELMER F. SHEPARD AND KATHRYN M. SHEPARD, HIS WIFE,

Petitioners,

vs.

CAL-NINE FARMS, A CORPORATION,

Respondent.

MEMORANDUM IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Pursuant to the provisions of Rule 23, Supreme Court Rules, Respondent respectfully submits the following memorandum in opposition to the Petition for Certiorari in the above-entitled case.

Federal Jurisdiction in the District Court and on appeal was based upon diversity of citizenship, 28 USC

1332, and all parties concede that the law of Arizona governs. Likewise, all parties concede that the Supreme Court of Arizona, as evidenced by the Arizona cases cited in the Petition for Certiorari, follows the so-called "benefit of the bargain" rule in measuring damages for fraudulent representations. This rule, as quoted by Petitioners in their brief, is "the difference between the real value of the property purchased and the value it was represented to have."

The only point relevant to this petition on which the parties disagree is the type of proof which may be offered under the law of Arizona to support recovery of damages in the situation of this case. The Arizona cases cited by Petitioners do not pass on this point; they simply lay down the general rule referred to above. Respondent offered at the trial evidence that the well on the land in question proved to be wholly worthless within a few months after respondent took possession, and that as a result thereof Respondent's cotton crop growing on that land was severely damaged from the resulting lack of water. (Findings XVI and XVII of the District Court, R. 38-39). Proof was then offered as to the reasonable and necessary cost of drilling a replacement well, and as to the pecuniary damage resulting to respondent from the injury to its crop. (R. 38-39). It was largely on the basis of this testimony that the trial court, sitting without a jury, awarded Respondent the judgment which Petitioners here challenge.

The trial court at no time departed from, or was in doubt about, the applicability of the "benefit of the bargain" rule in Arizona. Indeed, the findings of fact and conclusions of law specifically refer to this rule as being governing. (Conclusion of Law No. 3, R. 39). It would appear to be Petitioners' contention, though it is by no means apparent from the Petition, that the trial court in receiving proof on the issue of damages should have limited itself to the calling of a parade of expert witnesses on either side, who would testify as to the value of desert land with an operating well, and then as to the value of desert land without any well. Presumably, according to Petitioners, only on this basis would the Court be justified in awarding damages.

Admittedly, as stated in Petitioners' brief, the Supreme Court of Arizona has never "sanctioned" the commonsense method adopted by the courts* below, but on the other hand it has not disapproved it either. It has simply never had to pass on the question. The reputable authority, McCormick on Damages, 1935 ed., §122, p. 454, states that the cost of putting the property in the condition that it would have been in had the representations been true is an alternative measure of damages under the benefit of the bargain rule. In *Nunn v. Howard*, 216 Ky. 685, 288 S.W. 678, the

*Judge Pope, concurring in the Court of Appeals, said the replacement cost of the well would have been "the very minimum difference between the value of an irrigated ranch, which the purchasers thought they were buying, and a dry one . . . ." Petition, p. 11.

precise measure used below was specifically approved in a case which also involved misrepresentations as to the condition of a well. Kentucky, it should be noted, follows the same benefit of the bargain rule as does Arizona. *Gregory v. Forester*, 228 Ky. 201, 14 S.W. 2d 755. Also in accord is *Wood v. Niemeyer*, 185 Cal. 526, 197 P. 795, 797. Petitioners at no stage of this litigation have called to the attention of any of the Courts which have been asked to pass on the question a single case disapproving such a procedure.

Judge Pope, in his concurring opinion in the Court below, referred to the problem as a "difficult" one; however, it is clear that what he meant was that the problem was difficult in the sense that any undecided question of state law is bound to be difficult for a Federal Court sitting in a diversity case. Quite obviously from his concurring opinion, he was satisfied that the Supreme Court of Arizona would permit such testimony, and that justice had been done in this case.

What the question presented in this case boils down to, then, is whether this Court should attempt to predict the action of the Supreme Court of Arizona on a point upon which that Court has never passed, after the District Court and the Court of Appeals in the instant case have both agreed as to what the result would be. See *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S. Ct. 1015, 88 L. Ed. 1246. Even if the question were a doubtful one, or one on which there was a split of authority in other jurisdictions, this Court undoubt-

edly has matters before it of greater general importance which have a more legitimate claim on its time. When, in addition, all of the authorities and Courts which have passed on the point outside of Arizona have reached the conclusion that the testimonial foundation for damages in this case was correct, the case is not only of no general importance, but was obviously correctly decided below. The Petition for Certiorari is patently without merit and should be denied.

Respectfully submitted,

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